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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

NO. 73-1344

MARILYN ELAINE MAY, Administratrix
of the Estate of Stephen Todd May,
Petitioner,

v.

DR. RICHARD GOLDMAN,

and

DR. ROBERT JAY O'BRIEN, Individually and
T/DB as the FALLS CHURCH DENTAL HOSPITAL

and

DR. LEWIS E. MANGUS,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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IN THE

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NO.

MARILYN ELAINE MAY, Administratrix
of the Estate of Stephen Todd May,
Petitioner,

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DR. RICHARD GOLDMAN,

and

DR. ROBERT JAY O'BRIEN, Individually and
T/DB as the FALLS CHURCH DENTAL HOSPITAL

and

DR. LEWIS E. MANGUS,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Marilyn Elaine May, Administratrix of the Estate of Stephen Todd May, petitions for a writ of certiorari to review the decree or opinion[1] of the Supreme Court of Virginia entered in this case on December 7, 1973.

[1] Your Petitioner does not know what to call the document issued by the clerk's office of the Supreme Court of Virginia, as it is not a judgment, but at best may be called a "decree" of said court in that it affirms the judgment of a lower Virginia court. Page 1 of the appendix (P.1a) is a replica of said "decree" and a detailed analysis of said document discloses that no title, name or classification is provided thereon. It does refer to its opinion, but does not state the law for its opinion.

OPINIONS BELOW

The opinions of the courts below directly preceding this Petition are as follows:[2]

1. Decree and/or opinion of the Supreme Court of Virginia, undocketed, unnumbered and unreported, signed by the deputy clerk, affirming the decision of the Circuit Court of Arlington County and dated December 7, 1973 .....Page 1a.

2. Judgment of the Circuit Court of Arlington County, Virginia, Case No. Law 12767, dated February 16, 1973, that the Plaintiff below, Marilyn Elaine May, Administratrix, recover nothing of and from the Defendants below, Drs. Goldman and Mangus, Dr. O'Brien's Motion to Strike at the close of the plaintiff's case having been granted. Plaintiff's Motion for New Trial was denied .....Page 2a.

JURISDICTION

The decree of the Supreme Court of Virginia was entered on December 7, 1973 (P.1a), said decree issuing from the Commonwealth's court of last resort. No time entry is noted.

The decree by the clerk of the court is a "Final Judgment" of the Supreme Court of Virginia within the meaning of 28 U.S.C. Section 1257.[3] Jurisdiction of this Court is invoked under the Constitution of the United States, Fourteenth Amendment and under the Rules of the Supreme Court of the United States, Rule 19(a).[4] The civil appellate system of the Commonwealth of Virginia is federally unconstitutional under "State Action". Only two States of these United States, namely Virginia and West Virginia, use discriminatory legal procedures which are federally unconstitutional as applied to the case at bar.[5]

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[2]The appendices include both opinions below and are printed as a part of this petition in accordance with Rule 23(1)(i). References are denoted Page 1a et seq.

[3]*Burns v. Ohio*, 360 U.S. 252, 256, 79 S.Ct. 1164, 3 L.Ed.2d 1209 (1959)

[4]The Supreme Court of Virginia has decided a federal question of substance not heretofore determined by the United States Supreme Court.

[5]See footnote 8, page 8, and State Action, pages 9, 12, *infra.*

FEDERAL QUESTIONS PRESENTED

1. Whether or not the Commonwealth of Virginia is required to provide legislative enabling statutes for the judiciary system of Virginia to include the right of appeal to an appellate court from a trial court under the laws of the Constitution of the United States?

2 Can the legislature of the Commonwealth of Virginia pass into law the Virginia judicial system, constituting an unlawful delegation of legislative power by failing to set forth adequate appellate judicial standards, in violation of the Constitution of the Commonwealth of Virginia and of the Fourteenth Amendment of the Constitution of the United States?

3. Can the Supreme Court of Virginia in establishing the common law denying the right and privilege of a civil appeal, arbitrarily, capriciously, and unreasonably limit its appellate powers, in violation of the Constitution of the Commonwealth of Virginia and acting unconstitutionally in violation of the laws of the Constitution of the United States?

4. Whether or not an administratrix of an estate, in a wrongful death action, is by right or privilege in a state court of last resort entitled to have an appeal from an adverse judgment rendered by a state trial court, under the laws of the Constitution of the United States, where said state court of last resort is the only appellate court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Fourteenth Amendment of the Constitution of the United States.

2. 28 U.S.C.A. §1257–State Courts; Certiorari.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari***or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is

specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

This petition seeks review of a decision of the Supreme Court of Virginia (P.1a) that refused to grant an appeal by rejecting a Petition For Writ Of Error To The Circuit Court Of Arlington County, Virginia and in so doing decided a Federal question contrary to the Constitution of the United States. Your petitioner preserved the federal question, as Question 8 presented on appeal to the Supreme Court of Virginia.[6]

No opinion was written by the Supreme Court of Virginia. The Virginia practice is not to even assign a case number within the Supreme Court files, and thus the docketing of the instant case never did occur. In reviewing the document (P.1a) the absence of any comment regarding the Question 8 before the Virginia Supreme Court and in the refusing of the Petition For Writ Of Error, the Virginia Supreme Court, as it was illegally constituted under Virginia law, see page 20, *infra*, decided the federal question presented in the instant petition. All four federal questions, page 3, *supra*, are within and subsidiary to the federal question presented to the Virginia Supreme Court and preserved.

The actual question presented to the Virginia Court was:

> "IS THE APPELLANT MAY (PLAINTIFF BELOW) ENTITLED TO HAVE A FAIR AND JUST APPEAL FROM THE CIRCUIT COURT OF

---

[6]Quoting from Petitioner May's Petition to the Virginia Supreme Court, found at page 7 therein,

> "Eight questions are presented on appeal. Seven address error committed by the trial court and are identical to the assignments of error except for renumbering. Arguments support May's prayers to remand for a new trial on the merits. *Question 8 addresses the constitutional right of the Plaintiff May to an automatic appeal from the judgment below in a civil case under the United States Constitution and the Virginia jurisprudence system.*" (emphasis ours).

ARLINGTON COUNTY, VIRGINIA, UNDER THE LAWS OF THE CONSTITUTION OF THE UNITED STATES, WHERE SUCH RIGHT DOES NOT EXIST UNDER THE LAWS OF THE COMMONWEALTH OF VIRGINIA?"[7]

NATURE OF THE CASE

The original suit is a civil action in tort alleging medical malpractice against three doctors who were responsible for the anesthesia death of a four year old boy. The doctors failed to properly advise the mother, Marilyn Elaine May, of the risks inherent in the induction of anesthesia of an infant and failed to have a licensed medical doctor, a physician, present during the anesthesia induction. The medical and dental standards of care in Virginia are below the standard throughout the United States. The standards employed by the defendants during the actual induction of anesthesia and during actual resuscitation procedures for a boy suffering from cardiac arrest induced by the defendants, were incident throughout the trial proceedings in the Arlington County Court. The four year old boy, Stephen Todd May, died on May 8, 1968 in the presence of the three defendants.

Your petitioner's allegations are that Dr. Richard Goldman held himself out to be a dentist skilled in handling anesthesia and was qualified to be responsible for Stephen Todd May in performing restorative dentistry on the four year old boy. Goldman selected the Falls Church Dental Hospital (although it later proved to be unaccredited and was improperly licensed as a hospital in the Commonwealth of Virginia) which was under the control and administration of Dr. Robert Jay O'Brien, a dentist and oral surgeon. Also named as a defendant was Dr. Lewis E. Mangus, a physician and anesthesiologist who was to have handled the anesthesia induction, but instead had his nurse anesthetist, unlicensed in the Commonwealth of

[7]This question is found and argued in the Petition For Writ Of Error To The Circuit Court Of Arlington County, Virginia, dated June 10, 1973, Pages 46 through 49, said Petition which formed the basis for the Supreme Court of Virginia refusing the Writ Of Error.

Virginia, perform the anesthesia induction in his absence. It was claimed by the plaintiff below that all defendant doctors were responsible for the anesthesia death of the boy, as written on the death certificate for cause of death, to which all defendants denied liability and denied medical and dental negligence, and further denied that any acts of theirs individually or in concert caused the death of Stephen, even though during the trial no evidence was introduced to show that there was any intervening cause.

MATERIAL PROCEEDINGS IN THE COURTS BELOW

Your Petitioner, May, is the administratrix of the estate of her son, Stephen Todd May. She brought this action under Virginia Statute 8-634 to 8-639, the Wrongful Death Statute in effect at the time of the death of Stephen on May 8, 1968, for the maximum limit of $40,000.00. On August 5, 1969, a Motion For Judgment was filed in the Circuit Court of Arlington County, Virginia. On October 26, 1972, the trial court granted an Amended Motion For Judgment which was in effect at the commencement of trial on December 5, 1972. On that date the instant case came on to be heard before the trial court and a jury of seven. At the conclusion of the plaintiff's evidence and later of all the evidence, the defendants moved the trial court to strike and enter summary judgment for all defendants. At the close of the plaintiff's case the motion to strike as to Goldman and Mangus was overruled but was granted as to defendant O'Brien, to which the plaintiff duly excepted. After instructions were argued and read and after closing arguments by counsel for the defendants Goldman and Mangus and the plaintiff, the jury retired, but soon announced that they were hopelessly deadlocked, whereupon an *Allen* charge was given (*Allen v. U.S.*, 164 U.S. 492 (1896)). The jury was sent home overnight and retired again the following morning. Their deliberations resulted in a verdict for the defendants Goldman and Mangus on December 21, 1972.

The plaintiff timely filed a motion to set aside the verdict for the defendants as contrary to law and the evidence and motion for new trial on January 5, 1973. On February 16,

1973, the trial court entered final judgment order (P.2a) holding that the plaintiff would recover nothing of and from the defendants and denying the plaintiff's motion for new trial. It was from this Order (P.2a) that your Petitioner, May (plaintiff below), filed her petition for writ of error to the Supreme Court of Virginia. The plaintiff filed notice of appeal and assignment of errors on May 13, 1973, posted $5,000.00 bond by order of court on March 7, 1973, provided notices of identifying the trial transcript and hearing, notice of transmission of the record to the Supreme Court of Virginia. Defendants then objected to the transcript. The trial court held in-chambers conference on April 27, 1973 resulting in an Order of Court dated May 1, 1973. The plaintiff then complied with the aforesaid order, by adding additional transcript testimony by her medical expert who had to qualify under the strict locality rule as an expert on opinion evidence. The plaintiff below then filed her Petition For Writ Of Error To The Circuit Court Of Arlington County, Virginia on June 11, 1973.

A hearing was held before three justices of the Supreme Court of Virginia on November 9, 1973 on the sole issue of granting the appeal and not on the merits of the case on appeal. On December 7, 1973, the deputy clerk of the Supreme Court of Virginia handed down a decree rejecting the Petition For Writ Of Error (P.1a). It is from this final decree of the Supreme Court of Virginia that your Petitioner, May, seeks review by this Court on Writ of Certiorari.

This Petition For Writ Of Certiorari raises the federal questions of appellate rights and privileges, which could not be raised at the trial court level. The first time that said issues could be raised was in the Supreme Court of Virginia, and this was done in the Petition to that court as hereinbefore stated. See Michie's Jurisprudence for Virginia, Appeal and Error §26 Question for Appellate Court, stating that the lower court cannot consider the question. (P. 10a)

REASONS FOR GRANTING THE WRIT

I

THE COURT SHOULD GRANT CERTIORARI TO SETTLE WHETHER OR NOT A CITIZEN OF A STATE AND OF THE UNITED STATES IS ENTITLED TO EQUAL RIGHTS AND PRIVILEGES UNDER ANY FORM OF APPELLATE DUE PROCESS WITHIN THE STATE'S JUDICIAL SYSTEM, BECAUSE THE QUESTION IS UNRESOLVED AND VITALLY AFFECTS THE LIVES OF MANY THOUSANDS OF CITIZENS EACH YEAR.

Only two states within these United States deny their citizens the right to an appeal from an adverse judgment rendered by a trial court. These are Virginia and West Virginia, whose laws stem from the pre-Civil War period when their territories were both within the Commonwealth of Virginia.[8]

This petition for writ of certiorari is submitted because the Supreme Court of Virginia has refused to grant your Petitioner the right to continue the original suit filed in the Circuit Court of Arlington County, Virginia. An appeal is a continuation of the original suit rather than the inception of a new action (4 Am Jur 2d, Appeal And Error, Section 2). The essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. *Marbury v. Madison*, 1 Cranch (U.S.) 137, 2 L.Ed. 60 (1803). This petition is a continuation of the

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[8]Breen, *Solutions For Appellate Court Congestion*, 47 J. Am. Jud. Soc'y 228, 233 (1964); Lilly and Scalia, *Appellate Justice: A Crisis In Virginia?*, 57 Va. L. Rev. 3, 12 (1971).

See Michie's Jurisprudence for Virginia, Legislative Power §21, Generally (P. 8a) and §24 Not An Absolute Right (P. 8a). Also §25 states that this is well settled in Virginia, but there are no Federal citations to indicate that this Court has ever reviewed the issue presented by the instant case. A matter of right to an appeal exists only for litigants in disbarment proceedings and appeals from the state corporation commission, §27 (P. 11a).

original suit and is a continuation of the review performed by the Supreme Court of Virginia in issuing the final decree (P.1a).

Mr. Justice Frankfurter speaking for the Court in *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 72, 75 S.Ct. 614, 99 L.Ed. 897, 900 (1954), stated:

> The basis for petitioner's resort to this Court was primarily the Fourteenth Amendment, through the Due Process and Equal Protection Clauses. Only if a State deprives any person or denies him enforcement of a right guaranteed by the Fourteenth Amendment can its protection be invoked. Such a claim involves the threshold problem whether, in the circumstances of the case, what Iowa, through its courts, did amounted to "State Action". This is a complicated problem which for long has divided opinion in this court.
>
> *** the standards governing the exercise of our discretionary power of review upon writ of certiorari we have considered anew whether this case is one in which "There are special and important reasons" for granting the writ of certiorari, as required by Supreme Court Rule 19. 349 U.S. 73, 99 L.Ed. 901

In the instant case the Supreme Court of Virginia in performing its duty under the circumstances has for Virginia performed in a manner amounting to "State Action". There are important and special reasons for granting the writ, not only because the court action below was unconstitutional, but also because it affects all litigants within the court system of the Commonwealth.

This Court must take into consideration that the decision (P.1a) has decided a federal question of substance not heretofore determined. *Rice, supra*, and see *Copperweld Steel Co. v. Industrial Commission*, 324 U.S. 780, 785, 65 S.Ct. 1006, 89 L.Ed. 1363, 1366 (1945), addressing the United States Supreme Court's jurisdiction in reviewing a state court's decision under the 14th Amendment of the United States Constitution.

It is the final province of the Supreme Court to determine the existence of due process of law. *Del Castillo v. McConnico*, 168 U.S. 674, 682, 18 S.Ct. 229, 42 L.Ed. 622, 625 (1898).

THE INSTANT CASE IS NOT PETITIONED TO REVIEW ERROR IN A NEGLIGENCE CASE

Recognizing that the instant case was initiated in the Circuit Court for Arlington County, Virginia, as a wrongful death action alleging that three people, two dentists and a physician, were responsible for the death of a four year old boy while having his cavities filled, and that the Supreme Court of the United States has no jurisdiction over state court decisions to review error in negligence cases, nonetheless this Court has jurisdiction. The unique distinction of this case on appeal separates itself from previous negligence cases brought to this Court that were then dismissed for want of jurisdiction.

Writ of error to a state court to review a judgment affirming a judgment for the plaintiff in an action for death brought against a railway company was dismissed for want of jurisdiction. *Chicago, M. & St. P.R. Co. v. Hanson*, 235 U.S. 693, 35 S.Ct. 206, 59 L.Ed. 429 (1914), no opinion, Wisconsin Supreme Court, 157 Wisc. 455, 146 N.W. 524; *Gulf & S. I. R. Co. v. Boone*, 252 U.S. 567, 40 S.Ct. 343, 64 L.Ed. 719 (1920), no opinion, Supreme Court of Mississippi, 120 Miss. 632, 82 So. 335.

Petitioner, May, wants this Court to understand in very plain language that she is not petitioning the results of the decision in a negligence case, but the unconstitutional deprivation of appellate procedures within the Virginia judicial system. The *Chicago* and *Gulf* cases just cited were taken to this Court following review at the appellate level with appellate citations and court opinions. As stated at page 2, *supra*, the judgment of the Virginia Supreme Court was never docketed, never numbered, and never reported. It is not possible to find a Virginia citation or a Southeast Second citation in the instant case and such will never occur under the Virginia system.

To become the basis of a proceeding in error from this Court to the Supreme Court of a State, "a right, privilege, or immunity" claimed under a statute of the United States must be especially set up and claimed and must be denied by the State Court. *Atlantic Coast Line R. Co. v. Mims*, 242 U.S. 352, 37 S.Ct. 188, 61 L.Ed. 476 (1917). *Atlantic* was dismissed for want of jurisdiction because the petitioner alleged error by the Supreme Court of the State of South Carolina to review the judgment in favor of the plaintiff in an action for wrongful death. *Atlantic* is distinguishable because *Atlantic* did have its appellate review under due process and did not establish the basis for the federal question. Your Petitioner, May, has preserved the federal question as discussed at pages 4-5, *supra*. Further the Court in *Atlantic* stated that a substantial federal right or defense duly asserted cannot be lessened or destroyed by a state rule of practice.

In the Petition For Writ Of Error To The Supreme Court of Virginia, your Petitioner raised the federal question by stating:

> An aggrieved party should have the right of an appeal in the first instance. If said appeal has been then adversely decided against the appellant as the moving party, then and only then is a certiorari process constitutional. It is not a fair and just jurisprudence system that will not provide at least a short written opinion covering the decision on appeal in the first instance. This argument is advanced to protect the rights of the Appellant MAY in case this Honorable Court denies the petition for writ of error, providing therein the basis for constitutional determination by the United States Supreme Court of the civil appellate system of the Commonwealth of Virginia. Such a judicial prerogative comes under the heading of STATE ACTION.[9]

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[9]Petitioner May's Petition For Writ Of Error To The Circuit Court Of Arlington County, Virginia, in the Supreme Court of Virginia at Richmond, dated June 10, 1973, page 47.

STATE ACTION

Mr. Chief Justice Vinson in *Shelly v. Kraemer*, 334 U.S. 1, 20, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), stated:

> State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.

And the fact that a court makes a decision does not make the decision immune from the "state action" doctrine. In *Shelly*,

> Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government. (334 U.S. at 18).

Mr. Justice Holmes in *Rogers v. Alabama*, 192 U.S. 226, 24 S.Ct. 257, 48 L.Ed. 417 (1904), stated that the exercise of jurisdiction by the United States Supreme Court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights. The rights of your Petitioner, May, have been denied. As Mr. Justice Holmes stated in *Rogers*,

> We are of the opinion that the Federal question is raised by the record, and is properly before us. (192 U.S. at 231, 48 L.Ed. at 419)

And the Commonwealth of Virginia cannot pass or enforce laws that prohibit your Petitioner from filing this petition.

> The act of the legislature of Virginia***cannot affect the jurisdiction of the Supreme Court on appeal. *Wilson v. Mason*, 1 Cranch 45, 2 L.Ed. 29 (1801).

Professors Lilly and Scalia of the University of Virginia Law School in their article *Appellate Justice: A Crisis In Virginia?*[10], have accused their own Commonwealth's body judicial as possibly suffering from the disease of *microcephalia.* The authors use statistics to show that the total number of civil and criminal appeals sought rose from 357 to 1,185 in the 1959-69 time period, while the total number of writs and appeals granted increased from 149 to 227 (57 Va.L.Rev. 4). Figures II and III show these percentages (at 7 and 9). The burden of the substantial backlog has resulted in a decreasing proportion of appeals accepted. *** the Court is now declining to review cases in which it once would have been considered that a substantial possibility of error existed. The plight of the Virginia Supreme Court is well explained at 57 Va.L.Rev. 16 and the obvious Federal Due Process violations are apparent. Lilly and Scalia's article is worth reading by the Court *in toto.* Virginia needs help and the instant case is the vehicle by which the Virginia legislature should be propelled to action.

II

THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE DECREE OF THE SUPREME COURT OF VIRGINIA, FOR SAID COURT IN DENYING YOUR PETITIONER THE RIGHT AND PRIVILEGE OF APPEALING AN ADVERSE JUDGMENT RENDERED BY THE CIRCUIT COURT OF ARLINGTON COUNTY, VIRGINIA, WAS IN VIOLATION OF DUE PROCESS OF LAW, BOTH SUBSTANTIVE AND PROCEDURAL, UNDER THE CONSTITUTION OF THE UNITED STATES.

The United States Supreme Court's power to review state judgments is designed to restrain unconstitutional legislation, and not to correct errors. *Central Land Co. v. Laidley*, 159 U.S. 103, 10 S.Ct. 80, 40 L.Ed. 91 (1895) (action in contract on error to the Supreme Court of Appeals of the State of West Virginia). It is the unconstitutional legislation of Virginia that is one of the thrusts of your Petitioner, May.

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[10]See footnote 8, page 8 *supra*; 57 Va. L. Rev. 3 (1971).

Under Rule 5:1 of the Rules of the Supreme Court of Virginia (P. 5a), the definitions of "APPEAL" and "WRIT OF ERROR" are synonymous. Under these same rules, Rule 5:6 (P. 6a), the virginia Court has mixed together the nomenclature of *appeal* and *assignment of error*, yet defining them as synonymous. Throughout these rules (P. 5a-P. 7a) are intermingled the "Petition For Writ Of Error" and "Petition For Appeal".

Taking all the laws of Virginia at its current standing the Supreme Court of Virginia operates and looks at all civil cases under the doctrine and laws of *certiorari* and not under the laws of appeal. Is it not deprivation of property without due process of law whereby appellate judicial review is denied to check the mind of one judge sitting during a jury trial?

In *Coppedge v. United States*, 369 U.S. 438, 455-456, 82 S.Ct. 917, 926-927, 8 L.Ed.2d 21 (1962), Mr. Justice Stewart said,

> Justice demands an independent and objective assessment of a district judge's appraisal of his own conduct of a criminal trial.

Mr. Justice Stewart went on to say (at 456-457)

> The result is that a Court of Appeals may come to think of these preliminary proceedings as tantamount to appeals on the merits, and may tend to decide whether or not to grant leave to appeal by appraising the entire case in terms of whether or not reversible error appears. By the same token, when leave to appeal has been denied, and the case has come here, the Government has argued in the past, as it argues in this case, that the preliminary screening procedure was itself the equivalent of an affirmance on the merits. See *Lurk v. United States*, 366 U.S. 712, 81 S.Ct. 1229, 6 L.Ed.2d 845 (1961).

Although *Coppedge* was a criminal matter with a federal right of appeal granted by law, the screening process in *Coppedge* is analogous to the Virginia screening process known as the petition for writ of error.

Mr. Chief Justice Warren in speaking for the Court in *Coppedge*:

> ***it is our duty to assure to the greatest degree possible within the statutory framework for appeals created by Congress, equal treatment for every litigant before the bar. (369 U.S. at 446-447, 82 S.Ct. at 922) (Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 is footnoted.)

EQUAL JUSTICE UNDER LAW

Your Petitioner, for the sake of this argument and only for such sake, concedes that there is no federal constitutional right to appeal a civil judgment within a state's judicial system. But this only applies to a state that has *no* appellate review. Where appellate review has been established by the state, either through their own constitution or their own statutes, or by establishing specific rules of court, then that state has waived their immunity from federal constitutional requirements and that state must then apply its laws in a manner that provides *EQUAL JUSTICE UNDER LAW*. Any discrimination within the state's judicial system which permits discretionary review of trial court proceedings as to those cases to be appealed and those cases not to be appealed does not provide equal judicial review. Where no standards are established, where no rules are established, and where no court opinions are written or published regarding the methods, techniques, or systems used, and for the Clerk's office to state "doth reject said petition" (P.1a) all are in violation of the Fourteenth Amendment of the United States Constitution.

Mr. Justice Harlan said in *McKane v. Durston*, 153 U.S. 684, 14 S.Ct. 913, 38 L.Ed. 867 (1894),

> An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case...was not at common law and is not now a necessary element of due process of law.

> It is wholly within the discretion of the State to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.
>
> It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper.****But. . . whether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself. (153 U.S. at 687, 688, 14 S.Ct. at 915, 38 L.Ed. at 868)

Your Petitioner under *McKane* maintains that the constitutional or statutory provisions of the Commonwealth of Virginia regarding appeals must provide equal justice in all civil cases.

THE VIRGINIA CONSTITUTION PROVIDES THE AUTHORITY TO THE SUPREME COURT OF VIRGINIA TO REVIEW ALL JUDGMENTS OF A TRIAL JUDGE.

Article VI, Judiciary, of the Constitution of Virginia, Section 1, Judicial Power; Jurisdiction, states:

> The judicial power of the Commonwealth shall be vested in a Supreme Court ****
>
> The Supreme Court shall, by virtue of this Constitution, have original jurisdiction **** All other jurisdiction of the Supreme Court shall be appellate. (P. 4a)

By this section (Section 1, Judicial Power, *supra*) in all cases other than habeas corpus, mandamus and prohibition, the jurisdiction of the Supreme Court is appellate. *D.D. Jones Transfer & Warehouse Co. v. Commonwealth ex rel State Corp. Comm'n*, 174 Va. 185, 5 S.E.2d 628 (1939).

This section (Section 1, Judicial Power, *supra*) does not confer upon the Supreme Court the right of direct appeal from a judgment of a trial justice.*Southern Ry. v. Hill*, 106 Va. 501, 56 S.E. 278 (1907).

Your Petitioner, May, does not agree with the Supreme Court of Virginia that they have no jurisdiction over all appeals. To write legal opinions that are appellate decisions, based upon an indiscriminate selection is federally unconstitutional, particularly where the Virginia Constitution provides the judicial power to the Virginia Supreme Court. See Michie's Jurisprudence, Legislative Power, §22, Establishing Courts (P. 8a).

In 1907 the Supreme Court of Virginia said of its own that it did not have jurisdiction to grant an appeal, *Southern Ry. v. Hill, supra*, and has since used this opinion based upon reasoning of the Virginia legislative intent under the Virginia Constitution. Since then the Virginia legislature has not seen fit to correct the Court from its 1907 decision of *Southern*. If it had it would have increased the cost of the judiciary. Thus an escape from performing equal justice under the Virginia appellate judicial duty, as guaranteed under the Fourteenth Amendment of the United States Constitution, has been afforded. This is detrimental to the rights and privileges of your Petitioner, May.

Under the rule of *stare decisis*, this absence of a right of appeal cannot be changed by any future court no matter how constituted and therefore the Virginia Supreme Court must look to the United States Supreme Court to correct the unconstitutional error produced by *Southern* in 1907.

This unconstitutionally restrictive appellate procedure, Va. Rules 5:6 and 5:7 (P. 6a-7a), prevents and impedes the development of the common law within the Commonwealth of Virginia by discriminatory methods denying the right of appeal to some applicants while granting the right of appeal to other applicants. Lawyers and judges within the legal system of Virginia have no law under which to guide the course of their future causes of action. How can one advise a client about the prospects on appeal in a given case, when that client's counsel cannot even give ground rules (none exist) for a civil appeal? The instant case, for example, will become buried in the dusty records of the Arlington County Courthouse where no other legal minds can benefit from legal review unless this Court grants the Petition for Writ of Certiorari. Trial courts can judicially

continue to guide jury trials towards the defendant's verdicts in medical negligence cases without due process of law. To date there has been no plaintiff's verdict in a medical negligence case in Arlington County, Virginia. For an aggrieved party to have due process, several minds on appellate review must check the mind of the trial judge. The death of Stephen Todd May required three weeks to try, much of which constituted error by the trial judge detrimental to your Petitioner May.

Mr. Justice Black in *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1955), stated:

> It is true that a state is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See e.g., *McKane v. Durston*, (Page 15, *supra*). But that is not to say that a state that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discrimination.

Under *Griffin*, the Commonwealth of Virginia by establishing an appellate system for civil litigants must follow the due process and equal protection clauses of the Federal Constitution and your Petitioner, May, maintains that she has been discriminated against and not given equal treatment.

Mr. Chief Justice Warren in delivering the opinion of the Court in *Burns v. Ohio*, 360 U.S. 252, 258, 79 S.Ct. 1164, 3 L.Ed.2d 1209, 1214 (1959), stated:

> The State's action in this case in some ways is more final and disastrous from the defendant's point of view than was the *Griffin* situation. At least in *Griffin*, the defendant might have raised in the Supreme Court any claims that he had that were apparent on the bare record, though trial errors

> could not be raised. Here, the action of the State has completely barred the petitioner from obtaining any review at all in the Supreme Court of Ohio. The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of *Equal Justice Under Law.* (emphasis ours).

Applying *Burns* to the instant case, the action by the Supreme Court of Virginia by issuing its decree (P.1a) has completely barred your petitioner from obtaining any review at all in the appellate court system for Virginia. The facts as stated in the Statement of the Case, page 4, *supra*, and the proceedings below, do not constitute any constitutional review under due process of law.

Griffin and *Burns* establish clearly that the Federal Constitutional right exists for equal justice under Virginia law. Where an appellant system has already been provided in Virginia and that Virginia system utilizes writs of errors, appeals, and certiorari processes, such systems must provide equal appellate review. Petitioner, May, was wronged when the Supreme Court of Virginia through its deputy clerk stated:

> The petition*** having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of the opinion that there is no reversible error in the judgment complained of, **** (P.1a).

The deputy clerk is stating that Marilyn Elaine May, Administratrix of the estate of her son, Stephen Todd May, had an appellate review of her petition and of the transcript, which is not correct. The review was only on this issue of granting an appeal not on the appeal itself. In so doing the court used a different forum of review, an unequal forum of review in comparison with those litigants whose petitions are accepted (Va. Rule 5:21 P. 7a) and then are entitled to submit new briefs with oral arguments on the merits.

NO DECISION OF THE VIRGINIA SUPREME COURT SHALL BECOME THE JUDGMENT OF THE COURT EXCEPT BY THREE JUSTICES AND CONSTITUTIONALITY BY FOUR JUSTICES

At the writ of error hearing held on November 9, 1973 in the Supreme Court of Virginia Building in Richmond, three justices sat in conference, namely Mr. Justice Albertis S. Harrison, Jr., Mr. Justice Richard H. Poff and Mr. Justice Harry L. Carrico. The hearing was informal, *exparte* by petitioner and argument was limited by Rules of the Supreme Court of Virginia to the sole issue of granting the appeal and the reasons thereof and not to the issue of the merits of the case on appeal as would be based upon the trial record. No questions were asked by any Justice. The time was limited to twenty minutes, which would have been adequate for arguing the appellate merits on a summary court calendar, but which could not be argued because of the restrictive rules of Court. (Va. Rule 5:28 P. 7a)

Article VI, Judiciary, of the Constitution of Virginia, §2, Supreme Court, and the Va. Ann. Code, §17-94 (P. 4a-5a) require that four judges are necessary upon any constitutional question.

Not only did four judges *not* decide the constitutional question of a right of appeal, but further no decision was rendered by three judges as the final judgment of the Supreme Court of Virginia. In *Funkhouser v. Spahr*, 102 Va. 306, 46 S.E. 378 (1904), the highest court of Virginia held that the assent of at least four of the judges of the Supreme Court was required to determine that a law was or was not repugnant to the Constitution of Virginia or of the United States. In the instant case, *Funkhouser* was not followed. The Virginia Supreme Court was required to sit *en banc* under Rule 5:3 (P. 6a), as a jurisdictional necessity. This was a procedural error by the Virginia Supreme Court and under the federal law was not procedural due process of law, therefore violating your Petitioner's substantive due process rights.

The decree of the Virginia Supreme Court (P.1a) from which this Petition is taken, is stated to be a court opinion

(within the decree). This document states that Petitioner, May, in appearing before the Supreme Court of Virginia did not meet the requirements for appellate review based upon May's Petition and the record. As stated in their Virginia Rule 5:21 (P. 7a) under *comments*, the petition for apeal (writ of error) may *not* be adopted as an opening brief on appeal. The decree is unsigned by any judge or justice, signed only by the deputy clerk and did not consider the issues that would have been considered during a proper appellate review on the merits of the case. Does this not conclusively establish the assumption that the decree (P.1a) as an unnamed document is not a constitutional order of court?

PROCEDURAL AND SUBSTANTIVE DUE PROCESS

Your Petitioner argues that where the tremendous expense of litigation at the trial level is borne by a plaintiff below in prosecuting a medical malpractice and negligence case, such expenses exceeding $10,000.00, and the allegations of unprofessional conduct by the dental and medical profession has been made in the anesthesia death of a young boy, that the plaintiff below upon losing to the defendants below at the jury trial on the merits, should be entitled automatically to the right of appeal in an appellate court within the Commonwealth of Virginia. The Virginia certiorari process, without appellate review, becomes a judicial prerogative under the heading of "State Action". See argument page 12, *supra*. The Virginia system does not recognize the distinction between procedural due process and substantive due process, for if it did, this petition would not be necessary. In the instant case the Federal Constitutional violations of your Petitioner's procedural due process rights[11] have directly denied her her substantive due process rights.[12]

---

[11] *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 179, 71 S.Ct. 624, 95 L.Ed. 817 (1951).

[12] *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418, 458, 10 S.Ct. 462, 33 L.Ed. 970 (1890); see Paulson, *The Persistence of Substantive Due Process in the States*, 34 Minn. L. Rev. 91 (1950).

Article I of the Bill of Rights of the Constitution of Virginia for due process states:

> Section 11. That no person shall be deprived of his property without due process of law; ****

In *Joint Anti-Fascist Refugee Committee*, Mr. Justice Douglas in his concurring opinion stated:

> It is not without significance that most of the provisions of the bill of rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law. 341 U.S. at 179.

CONCLUSION

This right of substantive due process, as protected by procedural due process, will accordingly be denied your Petitioner unless this Court in accordance with the Fourteenth Amendment of the United States Constitution and Article I of the Bill of Rights of the Constitution of the Commonwealth of Virginia, applies the law and grants this Petition for Writ of Certiorari to the Supreme Court of Virginia. Please set the instant case down for briefing and argument on the merits.

Respectfully submitted,

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Counsel for Petitioner

March 4, 1974

APPENDIX

APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 7th day of December, 1973.

The petition of Marilyn Elaine May, administratrix of the estate of Stephen Todd May, for a writ of error to a judgment rendered by the Circuit Court of Arlington County on the 16th day of February, 1973, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Richard Goldman and others were defendants, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Teste:

Howard G. Turner, Clerk

By: /s/ Allen L. Lucy

Deputy Clerk

VIRGINIA:
IN THE CIRCUIT COURT OF ARLINGTON COUNTY

MARILYN ELAINE MAY, Administratrix
of the Estate of Stephen Todd May,

Plaintiff,

vs.

Law No. 12767

RICHARD GOLDMAN, et al.

Defendants.

FINAL JUDGMENT ORDER

This case came before the Court on the 2nd and 16th days of February, 1973 on the Plaintiff's motion for a new trial and was argued by counsel; whereupon

IT APPEARING TO THE COURT that this case was tried by a Jury in December of 1972 and more particularly a jury verdict was rendered in the case on the 21st day of December, 1972 in favor of the Defendants and that thereafter the Plaintiff, by and through her counsel, requested and was given leave to file post-verdict motions prior to the entry of any judgment in the case.

THE COURT OBSERVES that the case began before a jury on the 6th day of December, 1972 and after the plaintiff presented her evidence and rested her case, the Defendants, and each of them, moved the Court to strike the evidence and for the entry of summary judgment; then, after due argument of counsel and the citation of authorities in support thereof, the motion to strike was granted as to co-defendant Robert Jay O'Brien to which action of the Court the Plaintiff duly noted her exception.

THEREAFTER, the motions made by co-Defendants Richard Goldman and Lewis E. Mangus were denied by the

Court to which action those defendants, by and through their attorneys, duly noted their exceptions; thereafter, the co-Defendants presented their evidence and rested their cases and renewed their motions to strike the evidence and for summary judgment, which motions were overruled by the Court and to such action each of those Defendants duly noted their exceptions.

THEREAFTER, the parties submitted their instructions and arguments were heard on them, and to the Court's action in granting them and refusing them, the aggrieved parties duly noted their exception. The case was then submitted to the jury after the jury panel had been charged and after the final arguments of counsel. The jury thereafter retired to deliverate upon its verdict and in due course of time, returned to open Court with its verdict in favor of both defendants. Thereafter, the Plaintiff filed her motions for a new trial which was this day argued and overruled; to which action of the Court the Plaintiff duly noted her exceptions. Whereupon,

IT APPEARING TO THE COURT that since there is, and was no objection to the form of the verdict that it ought to be approved by the Court and that a final judgment ought to be entered in favor of the Defendants in accordance with the verdict of the jury. It is therefore,

ORDERED, ADJUDGED AND DECREED that the Plaintiff recover nothing of and from the Defendants and that further the Defendants are entitled to their costs in this behalf expended; and it is further;

ORDERED, ADJUDGED AND DECREED that the Plaintiff's motion for a new trial ought to be, and it is hereby, denied and that the case in its entirety ought to be, and is hereby, dismissed with costs awarded to the Defendants.

AND THIS ORDER IS FINAL.

This 16th day of February, 1973.

deliberate

/s/ Paul D. Brown
Judge

* * * *

CONSTITUTION OF VIRGINIA

ARTICLE VI

Judiciary.

§ 1. **Judicial power; jurisdiction.**—The judicial power of the Commonwealth shall be vested in a Supreme Court and in such other courts of original or appellate jurisdiction subordinate to the Supreme Court as the General Assembly may from time to time establish. Trial courts of general jurisdiction, appellate courts, and such other courts as shall be so designated by the General Assembly shall be known as courts of record.

The Supreme Court shall, by virtue of this Constitution, have original jurisdiction in cases of habeas corpus, mandamus, and prohibition and in matters of judicial censure, retirement, and removal under Section 10 of this Article. All other jurisdiction of the Supreme Court shall be apellate. Subject to such reasonable rules as may be prescribed as to the course of appeals and other procedural matters, the Supreme Court shall, by virtue of this Constitution, have appellate jurisdiction in cases involving the constitutionality of a law under this Constitution or the Constitution of the United States and in cases involving the life or liberty of any person. ****

Subject to the foregoing limitations, the General Assembly shall have the power to determine the original and appellate jurisdiction of the courts of the Commonwealth.

§ 2. **Supreme Court.**—The Supreme Court shall consist of seven justices. The General Assembly may, if three-fifths of the elected membership of each house so vote at two successive regular sessions, increase or decrease the number of justices of the Court, provided that the Court shall consist of no fewer than seven and no more than eleven justices. The Court may sit and render final judgment en banc or in divisions as may be prescribed by law. No decision shall become the judgment of the Court, however, except on the concurrence of at least three justices, and no law shall be declared unconstitutional under either this Constitution or the Constitution of the United States except on the concurrence of at least a majority of all justices of the Supreme Court.

Assent of four judges necessary upon constitutional question.–The assent of at least four of the judges of the Supreme Court is required by this section only when it is necessary to determine that a law is or is not repugnant to the Constitution of this State, or of the United States. Funkhouser v. Spahr, 102 Va. 306, 46 S.E. 378 (1904).

* * * *

Code of Virginia

§ 17-94. Court may sit and render final judgment en banc or in divisions; when decision becomes judgment of Court; majority must concur in declaring law unconstitutional; rehearings.–The Supreme Court may sit and render final judgment en banc or in divisions, as may be prescribed by rules of the Court not inconsistent with the provisions of this section. No decision shall become the judgment of the Court, however, except on the concurrence of at least three justices, and no law shall be declared unconstitutional under either the Constitution of Virginia or the Constitution of the United States except on the concurrence of at least a majority of all justices of the Supreme Court. If the justices composing any division shall differ as to the judgment to be rendered in any cause or if any justice of such division, within a time and in a manner to be fixed by the rules of the Court, shall certify that in his opinion any decision of such division of the Court is in conflict with a prior decision of the Court, or of one of the divisions thereof, the case shall be reheard and decided by the Court sitting en banc. (Code 1919, § 5862; 1938, p. 133; 1971, Ex. Sess., c. 51.)

* * * *

RULES OF SUPREME COURT OF VIRGINIA

Rule 5:1. Definition of Terms Used in This Part Five.

"This court" means the supreme court of Virginia.

"Appeal," "appellant," "appellee" include "writ of error," "plaintiff in error" and "defendant in error," respectively.

"Clerk of this court" means the clerk of the supreme court of Virginia and, unless the context otherwise requires, includes a deputy clerk.

"Judge" means judge of the trial court.

"Judgment" includes an order or decree from which an appeal is taken.

Rule 5:3. Convening of Court–When en Banc–When in Division.

(a) This court will sit en banc or in divisions.

(b) Whenever four or more of the justices are convened, the court shall be deemed to be sitting en banc and vested with all of the powers of the court. Whenever three of the justices are convened, the court shall be deemed to be sitting as a division, and vested with all of the powers of a division of the court.

(c) If the justices composing any division shall differ as to the judgment to be rendered in any case, or if, within ten days after the decision is rendered by the division, any justice of such division shall file in the office of the clerk of this court a certificate that, in his opinion, such decision is in conflict with a prior decision of this court or of one of the divisions thereof, or if this court shall so determine, the case shall be reheard and decided by this court sitting en banc.

Rule 5:6. Notice of Appeal and Assignments of Error.

No appeal shall be allowed unless, within thirty days after entry of final judgment, counsel files with the clerk notice of appeal and assignments of error. The notice of appeal and assignments of error shall contain a statement whether or not any transcript or statement of facts, testimony or other incidents of the case is to be thereafter filed. Within fourteen days thereafter counsel for the apellee shall file with the clerk assignments of cross-error, if any.

Rule 5:7. Objections in Trial Courts; Effect of Failure to Assign Error.

This court will not notice any objection requiring a ruling of the trial court unless the ground of objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this court to attain the ends of justice. Only errors assigned in the notice of appeal and assignments of error will be noticed by this court and error not so assigned will not be admitted as a ground of a reversal of a decision below.

Applied in Richmond Fixture & Equip. Co. v. Wallace, 212 Va. 123, 183 S.E.2d 175 (1971); Clarendon House, Inc. v. Helfert, 213 Va. 28, 189 S.E.2d 331 (1972).

Rule 5:21. Form and Contents of Petition for Appeal.

* * *, the form, contents and length of the petition for appeal shall conform in all respects to the requirements for the appellant's opening brief.

Comment. – Under the proposed rules, a petition for appeal may not be adopted as an opening brief because no printing will be done under the supervision of the clerk of the supreme court. In the court's experience under the existing rules, better briefs with citations of more recent authorities usually result when counsel file opening briefs instead of adopting petitions.

Rule 5:28. Oral Argument on Petition.

When counsel for the appellant desires to state orally the reasons for reviewing the judgment or decree complained of, he shall so state in the certificate required by Rule 5:22(c). When oral argument has been asked and a brief in opposition to granting the appeal has been filed, counsel for the appellant may, within five days, in lieu of oral argument, file a reply brief. Oral argument before a Justice shall be a waiver of the right to oral presentation to any other Justice or to the Court.

* * * *

Michie's Jurisprudence - Virginia -
Appeal and Error P. 144

§ 21. Generally.—There being no absolute right in a suitor to have a decision against him reviewed which must be respected in making laws, in the absence of a constitutional inhibition, it is within the power of the legislature to prescribe the causes and the courts in which parties shall be entitled to appellate remedies.[12]

[12]Fleshman v. McWhorter, 54 W.Va. 161, 46 S.E. 116 (1903).

Where the constitution does not expressly give the right of an appeal, the legislature has the right to extend or deny this remedy to the litigant. Carskadon v. Board, 61 W.Va. 468, 56 S.E. 834 (1907); Hulvey v. Roberts, 106 Va. 189, 55 S.E. 585 (1906).

Appellate jurisdiction may be conferred without regard to the matter in controversy, provided the power of the legislature is not restricted by the constitution. McIntosh v. Braden, 80 Va. 217 (1885).

§ 22. Establishing Courts.—*Generally.*—Where the legislature erects a new court of record, if that court exercises a particular jurisdiction according to the course of the common law, a writ of error would lie to its judgements.

Special Courts of Appeals.—Acts establishing special courts of appeals have been held constitutional. The present Virginia Constitution authorizes the general assembly to provide for a special court of appeals.

§ 24. Not an Absolute Right.—The right to have a decision reviewed is not an absolute right like the right to be heard in an original suit, but is subject to such conditions and restrictions as the legislature may put upon it.[1] While at common law a writ of error issued as a matter of course, by statute it ceases to be a writ of right.[2] A party deeming himself aggrieved is required to file a petition, assigning errors committed in the trial court to his prejudice. This petition is submitted to the judges and passed on, and they may grant or refuse it, as in their judgment is right and proper. This is because one trial, without review,

fulfills the maxim that there is a remedy for every wrong. Allowing appeals and writs of error in some cases only permits the remedy to be further pursued in them than in those as to which such provisions are not made.[4] And failure of the law to give a right of appeal, where a party feels that he has been injured by a decision, affords no ground for an application for the writ of mandamus.[5]

Appeal is not one of the inalienable rights guaranteed by the constitution.[6] It is not a vested right,[7] nor is it part of due process of law.[8]

---

[1] Casanova v. Kreusch, 21 W.Va. 720 (1883).

[2] Board of Ed. of Sherman District v. Hopkins, 19 W.Va. 84 (1881); Dryden v. Swinburn, 15 W.Va. 234 (1879); Wingfield v. Crenshaw, 13 Va. (3 Hen. & M.) 245 (1808).

[4 & 5] Fleshman v. McWhorter, 54 W.Va. 161, 46 S.E. 116 (1903).

[6] Taylor v. Smith, 140 Va. 217, 124 S.E. 259 (1924).

[7] Virginia Home for Incurables v. Coleman, 164 Va. 230, 178 S.E. 908 (1935).

[8] The right of appeal is not a part of due process of law and does not lie unless jurisdiction is conferred by the state constitution or by statute. Ringstaff v. Metropolitan Life Ins. Co., 164 Va. 196, 179 S.E. 66 (1935); Thomas v. State Highway Com'r, 166 Va. 512, 186 S.E. 172 (1936). See Constitutional Law, § 137.

The right of appeal is no part of due process of law. All that a litigant can ask is that in some appropriate way, before some duly constituted tribunal, his right shall be determined. Blankenship v. Virginia Unemployment Compensation Comm., 177 Va. 250, 13 S.E.2d 409 (1941).

§ 25. Conferred by Constitution or Statute.–That an appeal from the decision of an inferior court does not lie, unless jurisdiction to entertain such appeal is conferred by constitution or statute, is well settled.[11] The statutory procedural prerequisites must be observed.[12]

§ 26. Question for Appellate Court.–Whether a party has a right to appeal is not a question for the lower but for the appellate court.[13] Since the right of appeal is a right regulated entirely by statute, it is as much the duty of the appellate court to deny the writ when the decision complained of is plainly right, as it is to grant it when any doubt exists as to the propriety of the decision.[14]

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[11] Richmond Cedar Works v. Harper, 129 Va. 481, 106 S.E. 516 (1921); Carskadon v. Board, 61 W.Va. 468, 56 S.E. 834 (1907); Wingfield v. Neall, 60 W.Va. 106, 54 S.E. 47, 116 Am. St. Rep. 882, 10 L.R.A. (n.s.) 443, 9 Ann. Cas. 982 (1906); Cooper v. Saunders, 11 Va. (1 Hen. & M.) 413 (1807).

As a general proposition, appeals are of statutory origin, although in some instances they are afforded directly by the constitution. Jones v. Rhea, 130 Va. 345, 107 S.E. 814 (1921).

[12] Brooks v. Epperson, 164 Va. 37, 178 S.E. 787 (1935); Virginia Home for Incurables v. Coleman, 164 Va. 230, 178 S.E. 908 (1935); Clinch Valley Lumber Corp. v. Hagan Estates, 167 Va. 1, 187 S.E. 440 (1936); Covington Virginian v. Woods, 182 Va. 538, 29 S.E.2d 406 (1944).

[13] Todd v. Gallego Mills Mfg. Co., 84 Va. 586, 5 S.E. 676 (1888). See Craft v. Mann, 46 W.Va. 478, 33 S.E. 260 (1899); Townsend v. Norfolk Ry., etc., Co., 105 Va. 22, 52 S.E. 970, 115 Am. St. Rep. 842, 4 L.R.A. (n.s.) 87, 8 Ann. Cas. 558 (1906); MacCorkle v. Bouchelle, 132 W.Va. 409, 52 S.E.2d 233 (1949).

[14] McCue v. Com., 103 Va. 870, 49 S.E. 623 (1905).

§ 27. Cases Where Matter of Right.—*Generally.*—As stated before, the legislature can, and has in certain instances, conferred the right to review as a matter of right.

Supreme Court of Appeals.—It has been stated that no litigant, except in disbarment proceedings and in appeals from decisions of the state corporation commission, is entitled to an appeal or writ of error from the Virginia supreme court of appeals as a matter of right.[18]

[18]Smith v. Com., 161 Va. 1112, 172 S.E. 286 (1934).

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1344

MARILYN ELAINE MAY, Administratrix of the Estate of Stephen Todd May,

Petitioner,

v.

DR. RICHARD GOLDMAN

and

DR. ROBERT JAY O'BRIEN, Individually and T/DB as the FALLS CHURCH DENTAL HOSPITAL

and

DR. LEWIS E. MANGUS,

Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1344

MARILYN ELAINE MAY, Administratrix of
the Estate of Stephen Todd May,

Petitioner,

v.

DR. RICHARD GOLDMAN
and
DR. ROBERT JAY O'BRIEN, Individually
and T/DB as the FALLS CHURCH DENTAL
HOSPITAL
and
DR. LEWIS E. MANGUS,

Respondents.

TO A PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

OPINION BELOW

The opinions below are adequately set forth in the Petitioner's brief at page 2.

JURISDICTION

The jurisdictional requisites are set forth in Petitioner's brief at page 2.

FEDERAL QUESTIONS PRESENTED

1. Whether due process requires that Virginia provide a plaintiff an absolute right of appeal from an adverse judgment in the trial court.
2. Whether Virginia's discretionary system of appeals violates the equal protection clause of the fourteenth amendment.

STATEMENT OF THE CASE

Petitioner originally brought a civil action in tort against the respondents. Her claims for medical malpractice and wrongful death were tried before the Circuit Court of Arlington County, Virginia. After three weeks of trial and lengthy deliberation, the jury returned a verdict in favor of respondents. Petitioner subsequently filed a petition for writ of error with the Virginia Supreme Court. The trial transcript and briefs of petitioner and respondent were submitted. A twenty minute hearing with oral argument by petitioner was held before three justices of the Virginia Supreme Court on the issue of granting the appeal. The Virginia Supreme Court subsequently handed down a decree rejecting the petition for writ of error. It is from this decree of the Virginia Supreme Court the petitioner seeks review by this Court on Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

DUE PROCESS DOES NOT REQUIRE THAT A STATE PROVIDE A PLAINTIFF AN ABSOLUTE RIGHT OF APPEAL FROM AN ADVERSE JUDGMENT IN THE TRIAL COURT.

A. The Supreme Court case precedent on this point is substantial, recent, and controlling; therefore, the writ should be denied.

In *McKane v. Durston*, 153 U.S. 684, 687 (1894), Mr. Justice Harlan said for an unanimous court:

> An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment . . . was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review.

As recently as one year ago, the Court in a *per curiam* opinion reaffirmed the holding of *McKane v. Durston*, stating,

> This Court has long recognized that, even in criminal cases, due process does not require a state to provide an appellate system.

Ortwein v. Schwab, 410 U.S. 656, 660 (March 5, 1973).

In support of that holding the Court offered a lengthy citation of cases which over the years have re-affirmed *McKane v. Durston*.[1] In a separate opinion Mr. Justice Marshall clearly indicated that such cases controlled "efforts to secure appellate review of a decision by a

[1] *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973). *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); *District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972).

lower court."[2] Respondent, therefore, submits that *McKane v. Durston* and its substantial and recent progeny directly contradict the petitioner's assertion that due process entitled her to an appeal as a matter of right.[3] Therefore, respondents urge this Court to deny the writ.

B. Under the facts of this case, Virginia's judicial system has afforded petitioner due process. Therefore, this writ should be denied.

With regard to a litigant's initial access to the courts, Mr. Justice Harlan has said that "within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1970) citing *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 318 (1950). And with regard to appellate review, Mr. Justice White has stated for the Court:

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[2] It is to be noted that Mr. Justice Marshall's comment was made in a footnote to his dissenting opinion in *Ortwein v. Schwab*, 410 U.S. at 665. In his view, the holding of *McKane v. Durston* was correct as applied to appellate review of judicial decisions made in *some* court of law. However, he questioned whether due process did not require appellate review of administrative actions whose legality had never been ruled on in any court. Respondents hasten to point out that petitioner was afforded a jury trial of her claims before the Circuit Court of Arlington County, Virginia. There was no administrative action involved in the case.

[3] It is immaterial that Virginia and West Virginia are the only two states in the country that do not grant appeal as a matter of right. Petitioner's Brief at p. 8. As Mr. Justice Harlan declared, "the constitution of the United States does not make the privileges and immunities enjoyed by the citizens of one state under the constitution and laws of that state, the measure of privileges and immunities to be enjoyed, as of right, by a citizen of another state under its constitution and laws." *McKane v. Durston*, 153 U.S. 684, 687 (1894).

> [I]f a full and fair trial on the merits is provided, the due process clause of the Fourteenth Amendment does not require a state to provide appellate review.[4]

Lindsey v. Normet, 405 U.S. 56, 77 (1972).

Against this background, respondent respectfully directs the Court's attention to the fact that (1) petitioner's tort claim was decided by a jury in the Circuit Court of Arlington County, Virginia, after three weeks of trial and lengthy deliberation, (2) the trial record and petitioner's brief were received, seen, and inspected by the Virginia Supreme Court, and (3) petitioner's oral argument on the issue of whether appeal should be granted was heard by three justices of the Virginia Supreme Court in an *ex parte* hearing lasting twenty minutes. Petitioner's brief at 6, 7 18, 20 and 1a.

The foregoing facts, respondent submits, more than adequately meet the "due process" requirements specified by this Court in *Boddie*, *Mullane*, and *Lindsey*, *supra*.[5] *Therefore, respondent urges that petitioner's writ be denied.*

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[4] *Note* that Congress has *not* provided for appeal, as of right, from the decisions of the U. S. Court of Claims. There seems, however, no discernible sentiment to the effect that litigants before that court obtain less "due process" than those before courts whose decisions are appealable.

[5] At page 20 of her brief, petitioner alleges error because three justices–instead of four justices–"decided" the constitutional question of a right of appeal. Such an assertion is fallacious. The Virginia Supreme Court had previously decided the constitutional question in *Blankenship v. Va. Unemployment Compensation Comm'n*, 177 Va. 250, 13 S.E.2d 409 (1941). Therefore, four justices were not required in any event.

II.

A DISCRETIONARY SYSTEM OF APPEALS DOES NOT VIOLATE EQUAL PROTECTION OF THE LAW WHERE THE SELECTION OF CASES TO BE GRANTED APPELLATE REVIEW IS MADE ON A RATIONAL BASIS AND NOT ON SUSPECT CLASSIFICATIONS.

A. The standard for testing discretionary review is "rational basis."

No suspect classification, such as race, nationality, or alienage, is involved in Virginia's system of discretionary appeals. *Graham v. Richardson*, 403 U.S. 365, 372 (1971). Nor is there discrimination "on account of . . . poverty," *Griffin v. Illinois*, 351 U.S. 12, 18 (1955) or any "financial barrier restricting the availability of appellate review," *Burns v. Ohio*, 360 U.S. 252, 258 (1959). Nor has appellate review of a lower court's decision been viewed as so fundamental a right as to be accorded the more rigorous standard of strict scrutiny and compelling state interest. Therefore, the applicable standard is one of rational basis.

Also, "whether an appeal should be allowed, and, if so, under what circumstances, or on what conditions, are matters" which traditionally have been left to "each state to determine for itself." *McKane v. Durston*, 153 U.S. 684, 688 (1894). As Mr. Justice Black said:

> [T]he right of appeal may be accorded by the State to the accused *upon such terms as in its wisdom may be deemed proper*. . . . The States have exercised this discriminating power. The different states and the same state from time to time conditioned . . . appeals by fixing the time within which an appeal may be taken, by delimiting the scope of review, by shaping the mechanism by which alleged errors may be brought before the appellate tribunal, and so forth. (Emphasis added.)

Griffin v. Illinois, 351 U.S. 12, 21 (1956). Given this historical grant of wide discretion to the states and this Court's recognition of the value of state experimentation and innovation, any test other than the "rational basis" test would be inappropriate.[6]

B. The Virginia standard for granting appeals clearly meets a rational basis test.

The Virginia Supreme Court, at an early date, declared that no case would be declined where there is shown to have been a substantial possibility of injustice below.

> We have no such practice as an absolute right of appeal in civil and criminal cases. But the law requires a petition, accompanied by a transcript of the record, to be presented to the court, or one of its judges, whose duty it is to examine the errors assigned and to grant or refuse a writ, as may seem proper. It is as much the duty of the court, or judge, to deny the petition when of the opinion that the decision complained of is plainly right as it is to grant it when any doubt exists as to the propriety of the decision.

McCue v. Commonwealth, 103 Va. 870, 1008, 49 S.E. 623, 632 (1905). Moreover, it is presumed that the authority to allow an appeal will be exercised in a proper case. *District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937).

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[6] *See, e.g.*, Mr. Justice Powell's comments in *Johnson v. Louisiana*, 406 U.S. 356 (1972) to the effect that "one of the more obvious merits of our federal system is the opportunity it affords each state, if its people so choose, to become a 'laboratory' and to experiment with a range of trial and procedural alternatives." Respondents submit that the ever increasing demands on the states' appellate courts make it especially important that the states' discretion and imagination be left unrestricted and responsive to their peculiar situations.

Petitioner, however, challenges this presumption at page 13 of her brief. Citing an article by Professors Lilly and Scalia of the University of Virgina Law School,[7] petitioner suggests that Virginia has moved from a standard of "manifest injustice below" to one which only considers each case's "societal importance," *i.e.*, whether the legal point involved is one of general concern. This suggestion is directly refuted in the final report of a recently completed "in-depth" analysis of the Virginia Supreme Court, a project which Professor Lilly headed and whose report he authored:

> The justices indicated that the standard [of McCue v. Commonwealth] still prevails. The [project] staff attorneys saw no evidence to the contrary, although the statistics indicating a decline in the percentage of petitions granted gave rise to an inference that the standard of review has changed. . . . In fact, this decline in percentage may be attributable to a large number of frivolous appeals.[8]

Respondent submits that the standard of appellate review as clearly articulated in *McCue v. Commonwealth* has not been emasculated with time and that it represents

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[7] Lilly and Scalia, *Appellate Justice: A Crisis in Virginia?*, 57 Va. L. Rev. 3, 12-15 (1971).

[8] Lilly, *Appellate Justice Project: The Virginia Experience*, National Center for State Courts and the Law Enforcement Assistance Administration, Final Report, February 18, 1974, p. 23, fn. 36. This report represents the findings of the project staff attorneys who for over a year's time witnessed the Virginia Supreme Court's actions from receipt of petition to the final written decision, analyzed the court's efficiency, and explored other alternatives of appellate review. It is to be noted that the court enthusiastically cooperated with the attorneys and endorsed the study.

a rational basis for granting and denying appeals. Therefore, Virginia's discretionary system of appeals does not violate the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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